163 In the Supreme Court of the State of Washington.

No. 9771.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
P. J. CONCANNON, et ux., R. SHADE, et ux., and MARY CLASSEN, Respondents.

Certificate of Clerk.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause as I have been directed by the plaintiff in error to transmit to the Supreme Court of the United States. And I further certify that in pursuance of the writ of error heretofore filed in this cause I now transmit the said transcript together with the original writ of error and the original citation to the said Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Washington this 19th day of February 1914.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 24,094. Washington Supreme Court. Term No. 389. Northern Pacific Railway Company, plaintiff in error, vs. P. J. Concannon and Wife. Filed March 12th, 1914. File No. 24,094.

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Supreme Court of the United States

OCTOBER TERM, 1915.

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1915.

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of the State of Washington to review a final judgment of that court which denied the title of plaintiff in error to a portion of the right of way of the Northern Pacific Railroad Company granted by the Act of Congress of July 2, 1864. Plaintiff in error brought ejectment. The complaint alleged the incorporation of the Northern Pacific Railroad Company and the

grant by act of Congress of a right of way 200 feet in width on each side of the railroad where it should pass through the public domain; that the premises in question were within 200 feet of the constructed line; that in 1896 all the right of way and other property of the Northern Pacific Railroad Company was conveyed to the plaintiff in error, Northern Pacific Railway Company, which is a corporation of the State of Wisconsin. (Transcript, p. 2.) The answer set up among other things title to the premises sued for or some part thereof by adverse occupation for ten years or more, ten years being the time required by the laws of Washington to ripen title by adverse occupation. (Transcript, pp. 4-5.)

The evidence was incorporated in a bill of exceptions (Transcript, p. 83) but need not be considered except as it is stated in the opinion. The facts and the ground of decision sufficiently appear in the opinion of the Supreme Court of Washington (Transcript, pp. 84-90). It appears from this opinion that a portion of the premises for which ejectment was brought by the plaintiff in error lay within 200 feet of the center of the railway but more than 100 feet therefrom. This part of the premises was adjudged to belong to defendants in error because of adverse occupation, and that is the only question now raised. This ruling was grounded on the Act of Congress of April 28, 1904, reading:

> "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed; Provided, That no such conveyance shall have effect to diminish said

> right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.
>
> "Sec. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The possession of defendant in error commenced in 1898 and had not continued ten years when Congress passed this act, but had continued ten years before this action was commenced. There was evidence in the case (as appears from the opinion, Transcript p. 85) that defendant's possession followed some possession by one Girard, who again was preceded by one Smith. It was contended by the railway company in the court below that all three, Smith, Girard and Concannon, had been squatters without that sort of hostile and exclusive possession required by the state law to devest title. The state supreme court (Transcript, pp. 85-6) throwing out the possession of Smith and Girard as unsatisfactory and hardly sufficient to sustain a claim of right or to show color of title placed the case exclusively on the possession of Concannon, saying:

> "His holding was at all times hostile to the true owner. The character of his improvements was such as to challenge appellant's interest, and at all times appellant had notice and knowledge of the occupancy, as well as the character of the possession and improvements."

And again (Transcript, p. 86) saying:

> "But, as we view the law, Concannon has to his own credit a possession of ten years which has been admittedly hostile to the appellant."

This possession, as before stated, commenced in 1898 and had not continued ten years when Congress passed the law of 1904. The court planted its decision on the view, that the act of 1904 validated as title a possession commenced in 1898 and by the state statute completed in 1908. The Court held that the effect of the Act of Congress of April 28, 1904, was to permit acquisition of title by adverse possession partly or all *after* the passage of the Act; while we contend that the Act has no future operation.

There is but one question in the case and that is whether the Act of Congress authorized acquisition of titles in the railroad company's right of way by future adverse occupation.

ASSIGNMENT OF ERRORS.

Errors are properly assigned in the record (Transcript, p. 95).

ARGUMENT.

Northern Pacific Railway Company v. Townsend, 190 U. S. 267, determines that the Northern Pacific right of way was a fee granted on condition that it be used for the purposes of the grant; that the railway company is incapable of conveying it or any part of it and that no adverse occupation under state laws can confer title. After this decision it became known to Congress that the railroad company had made deeds purporting to convey certain parcels of its right of way. These deeds and the purchases thereunder having been made in good faith Congress evidently passed the Act of April 28, 1904, to relieve the hardship which would result in such cases by applica-

tion of the rule of the *Townsend* decision. The act says that all conveyances *heretofore* made are confirmed and we submit there is no ground whatsoever for overruling the plain language of the act—which is confined to conveyances *heretofore* made—and by judicial legislation enlarging the act to include conveyances *hereafter* made.

The court in *Northern Pacific Railway Company v. Ely*, 197 U. S. 1, considered a case of adverse occupation which had continued ten years or more before the act of 1904 was passed. On the principle that adverse possession may be considered as tantamount to a conveyance or as presuming a conveyance the Court held that the act, while speaking only of conveyances, should be construed to include adverse occupations. The court said that the defendants in the case "had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm". Obviously this is an accurate statement of the effect of the act and was carefully and advisedly made by the court. It is an act to confirm certain then existing invalid titles. *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 509.

It will not do to say that the act is remedial and therefore should be enlarged to cover matters not included within its language. Undoubtedly it is remedial, but this is no reason why the Court should legislate. The act says "are hereby *legalized, validated* and *confirmed*". Each of the words "legalized," "validated" and "confirmed" is applicable only to things then done and cannot be stretched or tortured to lay down any rule for things afterward to be done. The act says "conveyances heretofore made" are legalized, validated and confirmed. Adverse occupations are not mentioned. The *Ely* decision rests on the inference

that Congress must have intended to include adverse occupations, though mentioning only conveyances. But there is no warrant in that decision for extending the act beyond what was plainly intended by Congress to be its sole operation, viz., an act validating and confirming certain then consummate but imperfect titles. As it is plain that the act is confined in its operation to those *deeds* "heretofore made" and as *adverse possession,* though not mentioned, was held included because tantamount to a deed, there is no ground whatsoever for extending the act beyond validation of adverse possession then consummated. The same language that limits the act to *deeds* "heretofore made" limits similarly the adverse possession to be validated and confirmed, because the only reference to adverse possession is in the words "deeds heretofore made".

Attention is called to the stipulation filed in *Northern Pacific Railway Company v. Shade* and *Northern Pacific Railway Company v. Classen,* numbers 88 and 89 on present docket, that those cases abide the event of this.

CHARLES W. BUNN,
For Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Our understanding of the decision of the state supreme court (Tr. 85, 86), as stated on page 3 of our brief, is that the court rested its decision wholly on the Federal question; that while discussing the previous possession of Smith and Girard and pointing out the unsatisfactory evidence, particularly of Smith's possession, and the unsatisfactory evidence of conveyance from Smith to Girard and from Girard to Concannon, and without deciding whether the possession of Smith or that of Girard was hostile or whether either possession or both could be tacked to that of Concannon to make continuous hostile possession, the court was entirely satisfied that the possession of *Concannon* was

hostile and did not plant its decision on any other possession.

The brief of defendant in error (pp. 5, 6) questions our conclusion and suggests that the state supreme court intended to plant its decision on two grounds (a) the possession of Concannon, which necessarily involved decision of the Federal question and (b) ten years possession of Concannon and Girard or Concannon, Girard and Smith, tacked together, which if tacked would make ten years possession before the act of 1904 and therefore would not involve the Federal question.

We are confident careful reading of the state court's decision shows the decision to have been planted entirely on Concannon's possession that being the sole ground of decision. But whether or not this be so, it must be admitted that the state court did not *clearly* or *certainly* rest its decision on the non-Federal contention; and that, to say the least, it is doubtful if the court intended to hold that Concannon's possession could be tacked to that of Girard or Girard and Smith.

The state court having clearly and certainly decided the Federal question (as we contend, erroneously) the judgment will be reversed unless it appears clearly and certainly that the state court has actually decided some issue of state law sufficiently broad to maintain the judgment.

And it should be borne in mind that this court will consider the Federal question only and on this writ of error cannot go into the question of state law.

As the court said through Mr. Justice Miller in *Murdock v. Memphis*, 20 Wall 590, p. 636:

> "6. If it was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue *ad-*

> *judged* by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

The court said in *Anderson v. Carkins,* 135 U. S. 483, 491:

> "So it results that the federal question in this case was not rightly decided by the state court; and no other question appears which, *rightly decided,* upholds its decree. The case, therefore, must be reversed," etc.

Again the doctrine is stated by Mr. Justice Van Devanter in the opinion in *New Orleans v. National Rice Company,* 234 U. S. 80, 86:

> "As it *clearly* appears that the judgment rested upon a ground which was not only adequate to sustain it but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right," etc.

German Savings Society v. Dormitzer, 192 U. S. 125, 127, is precisely in point. There the court by Mr. Justice Holmes said:

> "But the opinion of the court deals expressly with the constitutional rights of the Savings Society and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock v. Mulvane,* 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property."

It is to be observed that the important issue in this case is the Federal question and that the decision of that question controls a number of other cases; while if the judgment in this case be reversed for error in deciding the Federal question, the usual order being for further proceedings in acordance with the opinion of this court (*Steinfeld v. Zeckendorf*, opinion Nov. 1, 1915), the state court will be open to hear and decide all the non-Federal questions in the record.

CHARLES W. BUNN,
For Plaintiff in Error.

ADDENDA.

Maguire v. Tyler, 8 Wall. 650, 668-672, is a case where the court below had dismissed the bill without indicating the grounds of the decree. The case involved a federal question and also questions of state law. In the opinion originally filed the court seems to have considered some questions of state law in addition to the federal question and made an order reversing the decree below with directions to affirm the decree of the St. Louis Court of Common Pleas. But on motion to reform the entry of judgment it was pointed out that the judgment as originally entered had the effect to foreclose the state court from consideration of the questions involved of purely state law; and that in a case where the decree of the state court is silent as to the grounds of dismissing the suit, reversal by the Supreme Court should be limited to the federal question alone, leaving still open in the state court the other defenses presented in the record which are of local jurisdiction. The Supreme Court therefore modified its decree and entered directions for remanding the case for further proceedings in conformity to the opinion of the court.

Klinger v. Missouri, 13 Wall. 257, is a case where the ground of decision in the court below did not distinctly appear. The court may have rejected the juror, either for refusal to take the test oath, or because he was an unfit juror. Therefore it was not made to appear that the state court decided a federal question.

Johnson v. Risk, 137 U. S. 300, is a similar case, where it was not made to appear that the state court decided any federal question.

Walter A. Wood Co. v. Skinner, 139 U. S. 293, is a case also where the ground of decision below did not appear in the record and therefore it could not be determined that the state court had decided any federal question.

Eustis v. Bolles, 150 U. S. 361, is a case where it affirmatively appeared that the Supreme Judicial Court of Massachusetts had decided a question of state law sufficient to maintain the judgment.

Dibble v. Bellingham Bay Land Company, 163 U. S. 63, is another case where the state court had considered the federal question but had passed on a question of purely state law sufficient to maintain the judgment no matter how the federal question was decided.

It might be inferred from some language of Mr. Justice Curtis, pp. 38, 39, "Jurisdiction of United States Courts," that he supposed this court might in certain cases pass on questions of purely state law. But it is to be observed, first, that Mr. Justice Curtis is there referring to cases where it does not appear in the record affirmatively that the state court decided a federal question; and, second, that the language referred to of Mr. Justice Curtis is from lectures at the Harvard Law School delivered before the opinion in *Murdock v. Memphis*. The editor of Mr. Justice Curtis' lectures (2nd Ed., pp. 46-52), after stating clearly the opinion in *Murdock v. Memphis*, lays down the present rule as we contend; that is, where the federal question was decided erroneously against plaintiff in error further inquiry in this court is whether any other matter or issue sufficiently broad to maintain the judgment was *adjudged* by the state court.

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Supreme Court of the United States

OCTOBER TERM, 1915

Number 87

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
P. J. CONCANNON AND WIFE,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

WILLIAM E. HAYDEN
For Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1915

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

It is stated on page 2 of the brief of plaintiff in error that the answer of defendants in error "set up among other things title to the premises sued for, or some part thereof, by adverse possession for ten years or more." The defendants in error, in addition to alleging, in the first and second affirmative defenses of their answer, title in them perfected by adverse possession for the statutory period of ten years both prior to the commencement of the suit and prior to April 28, 1904, set up also, in their third affirmative defense, title by estoppal by reason of valuable improvements made during the period of such adverse possession in good faith

and in the belief that they were the owners of said land and with the knowledge of plaintiff and the Northern Pacific Railroad Company, and without any objection or claim of title on the part of either of them (Tr., pp. 4 and 5).

The purpose in alleging a perfected title in defendants prior to April 28, 1904, as well as prior to the commencement of the suit, was to meet plaintiff's contention that the act of Congress of that date, entitled, "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company" (33 U. S. Stat. at L., p. 538), and the construction of said act by this Court in the case of *Northern Pacific Railway Company vs. Ely*, 197 U. S. 1, 49 Law Ed. 639, made it necessary for defendants to show a perfected title prior to that date.

Defendants contended before the State Supreme Court, and still contend that they had clearly proved a perfected title prior to April 28, 1904, not only by adverse possession, but also by estoppel, and that, in the decision of the case, it was unnecessary to invoke any federal question other than that decided in the *Ely* case, *supra*, adversely to the claims of plaintiff in error.

It is true, as stated on page 3 of the brief of plaintiff in error, that defendants' possession followed possession by one Girard, who, again, was preceded by one Smith, but we submit that it is not altogether true, as stated by counsel on the

same page of his brief, that "the State Supreme Court (Tr., pp. 85-86), throwing out the possession of Smith and Girard as unsatisfactory and hardly sufficient to sustain a claim of right or show color of title, placed the case exclusively on the possession of Concannon." The Court, in its opinion (Tr., p. 85), says:

"His (Concannon's) possession comes through one Smith, who settled on the premises in 1885. Smith sold to one Girard in 1892. So far as the record shows, Smith may have been a squatter. His position is unexplained. Girard fenced the land and made some improvements thereon. Girard remained in exclusive possession of the premises until 1898, when he sold to Concannon, who has added to the improvements so that they now possess the character of a permanent home and are of the value of from $1,500 to $2,000. * * * Girard testifies he received a deed from Smith and that he gave this deed and his own to Concannon. Concannon swears that he received a deed. None of these instruments were recorded and, according to the testimony of Concannon, they are now lost. Although neither of these witnesses can remember who made out the deeds, they agree in a general way as to the description of them and both say that the recited description of the land was such as to include the disputed tract. Both insist that it was their intention to claim the land as against the world." * * "It is insisted, however, that the possession of Concannon, which dates from 1898, cannot be tacked to that of Girard, and, without it, his title cannot be sustained. The rule, as we understand it to be, is that where there is a privity of interest, *such possession can be tacked.* We grant that the evidence of the deeds from Smith to Girard and from Girard to Concannon is unsatisfactory, and, *without the aid of the other circumstances and conditions which we have noticed,*

would hardly be sufficient to sustain a claim of right or show color of title. But, as we view the law, Concannon has to his own credit a possession of ten years which has been admittedly hostile to the appellant."

In the next to the last sentence of the above quotation, the intimation, if not the holding, is that the evidence of these deeds, though unsatisfactory, is, *with* the aid of the other circumstances and conditions noticed, sufficient to sustain a claim of right and show color of title.

The State Supreme Court did not pass upon, or even refer to the defense of estoppel set up in defendants' third affirmative defense, notwithstanding the fact that this and other courts have held that title by estoppel can be acquired short of the limitation period. *(Galliher vs. Cadwell,* 145 U. S. 368; 36 Law Ed., p. 740, and cases therein cited; *Patterson vs. Hewitt,* 195 U. S. 309; 49 Law Ed. 214; *2 Pomeroy's Equity Jurisprudence,* Sec. 818, p. 1451).

While the State Court holds that the Validating Act authorizes title by adverse possession initiated before the passage of that act and completed thereafter, we submit that the facts found by the Court in its opinion (Tr., pp. 85 and 86) are sufficient to show a perfected title in defendants on April 28, 1904.

ARGUMENT.

I.

The only obstacle that ever existed in the way of obtaining title to any part of the right of way in question, either by conveyance from the Company or by adverse possession, was the policy of the government to keep the right of way undiminished and unimpaired to the end that the Company might perform its duty to the public as a common carrier, and it was specifically upon this ground that this Court, in the case of *Northern Pacific Railway Co. vs. Townsend*, 190 U. S. 267; 47 Law Ed. 1044, decided against the claims of titles by adverse possession set up in that case.

The act of April 28, 1904, was a solemn declaration of the public policy of the United States with respect to the right of way in question, assented to by the Northern Pacific Railway Co., that 100 feet on each side of the center line of the main track of its railroad as now established and maintained was sufficient to enable the Company to perform all of the obligations to the United States and to the public generally which it assumed when it accepted the right of way and established its railroad. The effect of the passage of the act was to eliminate the interest of the United States in that portion of the right of way outside of the 100-foot limit and, the interest of the government being eliminated, the parties to this case stand with respect to the land in controversy in the position of mere private pro-

prietors, and their respective rights are to be determined according to rules no different from those employed in determining the rights of other parties to other lands.

In the case of *Northern Pacific Railway Co. vs. Ely*, 197 U. S. 1; 49 Law Ed. 641, this Court, after referring to its holding in the *Townsend* case that individuals could not, for private purposes, acquire by adverse possession any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company, says

"We are not prepared to overrule that decision, and, tested by it, the judgment in this case must be reversed. But we were then dealing with the *original right of way* which was of a width of 400 feet."

Again:

"The act of April 28, 1904, in view of our decision of that case, was obviously intended to and did have the effect to *narrow the right of way to 200 feet* in width so far, at least, as, outside of that strip, the original right of way had been parted with."

We contend that the Validating Act is addressed to the future as well as to the past—that it was intended to operate upon, and give a certain legal effect to not only what had been done, but also what might be done in the future.

In its retrospective operation, it gave to adverse possession of that part of the right of way of the Company lying outside of the 100-foot limit a qual-

ity and legal effect which it did not before have, and provided, in substance, that such possession, theretofore a legal nullity, should become an effective means of divesting the Company's title and vesting such title in the adverse claimant. This being the quality given such possession when of ten years' duration, it is difficult to understand why such possession, though for only six years, should not, *pro tanto*, have the same quality.

Referring to the period of defendants' adverse possession intervening between the date of the Validating Act and the time of the commencement of the suit, it is to be noted that all legislation is, presumptively, addressed to the future and this presumption is strengthened in view of the purpose of the act to waive any interest the United States might have to that portion of the right of way lying outside of the 100-foot limit, and, we submit, it is not overborne merely by the use in the act of the word "*heretofore.*"

II.

The Validating Act may also be considered as an amendment to the act of Congress and the joint resolutions mentioned in plaintiff complaint as the sources of its title to the right of way in question.

For the title to its right of way, plaintiff relies upon the act of Congress of July 2, 1864, entitled, "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast by the

Northern Route" (13 U. S. Stat. at L., p. 365), "Joint Resolution Granting Right of Way for the Construction of a Railroad from a Point at or near Portland, Oregon, to a Point West of the Cascade Mountains, in Washington Territory," approved April 10, 1869 (16 U. S. Stat. at L., p. 57), and "A Resolution Authorizing the Northern Pacific Railroad Company to Issue Its Bonds for the Construction of Its Road and to Secure the Same by a Mortgage and for Other Purposes," approved May 31, 1870 (16 U. S. Stat. at L., p. 378).

Section 1 of the act of July 2, 1864, empowers the Northern Pacific Railroad Company "to lay out, locate * * * a continuous railroad * * * beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route * * * to some point on Puget's Sound, with a branch, *via* the valley of the Columbia River, to a point at or near Portland, in the State of Oregon," and section 2 grants to said Company, its successors and assigns, a right of way for the construction of the road "to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain." Section 20 of said act provides:

"That the better to accomplish the object of this act, namely, to *promote the public interest and welfare* by the construction of said railroad and telegraph line, and keeping the same in working order,

and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, *add to, alter, amend, or repeal this act.*"

The joint resolution of April 10, 1869, authorizes the Railroad Company "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound * * said extension being subject to all the conditions, and provisions, and said Company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said Company, and all acts additional to and amendatory thereof."

Section 1 of the resolution of May 31, 1870, after authorizing the execution of a bond mortgage, also authorizes the Company "to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

Section 2 of said joint resolution provides: "That Congress *may at any time alter or amend this joint resolution*, having due regard to the rights of the said Company, and any other parties."

If, as is implied by the conveyances which have been made by the Northern Pacific Railway Com-

pany and its predecessor in interest and the passage by Congress of the Validating Act, 100 feet on each side of the center line of its road is sufficient to enable it to perform its duties and discharge its obligations to the United States and to the public generally, the "public interest and welfare" demanded that all the obstacles that lay in the way of the alienation by the Northern Pacific Railway Company of that part of its right of way not needed in the operation of its road should be removed, and we submit that in and by said act all of such obstacles were removed, and that the act of July 2, 1864, and said joint resolutions were amended accordingly.

Respectfully submitted,

WILLIAM H. HAYDEN,

For Defendants in Error.